IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ROBERT ALLEN WEITZEL, Defendant.	**MEMORANDUM DECISION AND ORDER** Case No. 991700983 Judge Thomas L. Kay

This case is before the court on Defendant's Motion for New Trial. The court has reviewed the parties' memoranda, the relevant case law, and all applicable statutory provisions. Additionally, the court has thoroughly considered all of the testimony presented at the evidentiary hearings and the arguments provided by counsel. Now being fully advised, the court makes the following ruling.

Procedural History

On September 21, 1999, Defendant Robert Allen Weitzel was charged with five counts of first degree murder. At the conclusion of the preliminary hearing, the magistrate found probable cause to believe that Defendant had committed the crimes as charged and he was bound over to district court. On July 10, 2000, following approximately six weeks of trial, Defendant was convicted on two counts of manslaughter, each a second degree felony, and three counts of negligent homicide, each a class A misdemeanor. On August 14, 2000, Defendant filed a motion for arrest of judgment which, following a hearing, was denied on September 5, 2000. Following a sentencing hearing on September 8, 2000, Defendant was sentenced to an indeterminate term of one to fifteen years in the Utah State Prison for each manslaughter conviction, and for one year on each negligent homicide conviction. On September 12, 2000, Defendant filed a motion for a new trial. Evidentiary hearings were held and testimony was heard from Dr. Perry Fine and two Assistant Attorneys General, Elizabeth Bowman and Charlene Barlow. Following oral arguments on December 13, 2000, the court took the matter under advisement. After the motion was taken under advisement, the State filed another supplemental memorandum in support of its arguments.

Summary of the Parties' Arguments

Defendant asserts that the court should grant him a new trial, pursuant to Rule 24 of the Utah Rules of Criminal Procedure, because errors committed by the prosecution had a substantial adverse effect on his right to a fair trial. Specifically, Defendant alleges that the prosecutors were aware that Dr. Fine's expert opinions were completely contrary to the central issues constituting the State's theory of the case. Although this information had both exculpatory and impeachment value and was material to the determination of his guilt or innocence, and despite the fact that a specific request had been made asking prosecutors to disclose such evidence, the prosecution failed to disclose Dr. Fine's opinions. Defendant argues that this inexcusable failure to disclose entitles him to a new trial because (1) the undisclosed evidence constitutes newly–discovered evidence and the failure to disclose (2) was the result of prosecutorial misconduct, (3) violated due process and the *Brady* rule, and (4) violated Rule 16 of the Utah Rules of Criminal Procedure.

The State argues that it was justified in not disclosing Dr. Fine's opinions. First, Dr. Fine's opinions were inculpatory and not subject to disclosure because he stated that Defendant's conduct in treating the patients was inappropriate, inadequate, and medically negligent. Second, although Dr. Fine opined that Defendant's treatment did not constitute criminal conduct, that opinion would have been inadmissible at trial pursuant to the Utah Rules of Evidence. *See* Utah R. Evid. 704(b) (experts may not "state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone."). Because Dr. Fine's opinions would have been inadmissible at trial, the State was under no obligation to disclose these opinions to the defense.

Third, the State argues that Dr. Fine's opinions were not constitutionally material. Had he testified at trial, his opinions would have been cumulative and, therefore, would not have affected the jury's determinations. "Given the fact that the Jury found defendant guilty of three counts of Negligent Homicide, it is hard to see how their finding would have been any different had Dr. Fine testified." Pl.'s Resp. to Def.'s Mot. at 6. Finally, regardless of whether the substance of Dr. Fine's opinions was disclosed, prosecutors informed the defense that he was a potential witness. Defense counsel was provided with a witness list that included Dr. Fine and was informed when he was replaced by Dr. Fehlauer. This alone was sufficient to satisfy any duty prosecutors may have had under the *Brady* rule. *See Relish v. State*,

860 P.2d 455, 459 (Wyo. 1993) ("The prosecution's disclosure of [the witness], by including his name on the stipulated witness list, was sufficient to meet any duty the prosecutor may have had under *Brady*."). Disclosing the name of Dr. Fine put the defense on notice that he was a potential witness and may have information concerning the case. With reasonable diligence, Defendant could have easily contacted Dr. Fine and interviewed him. "The fact that [the defense] chose to expend their resources in other areas is a tactical decision and their failure to interview witnesses cannot be blamed on the State." Pl.'s Resp. to Def.'s Mot. at 7. For these reasons, the State argues that prosecutors had no duty to disclose Dr. Fine's opinions and, therefore, Defendant's motion for a new trial should be denied.

Relevant Facts

On October 6, 1999, defense counsel filed a Request for Discovery expressly requesting "[e]vidence known to the prosecutor that tends to negate the guilt of the Defendant, mitigate the guilt of the Defendant, or mitigate the degree of the offense for reduced punishment, i.e., all *Brady* material." Def.'s Req. for Disc. at p.2. In early April 2000, Dr. Bradford Hare, a designated expert witness for the State, had a short conversation with Dr. Perry Fine. During this conversation, Dr. Hare indicated that he would consider Dr. Fine's expertise in end–of–life care important to adequately address certain issues concerning Defendant's conduct in caring for the elderly patients in this case. Dr. Fine, a Professor of Anesthesiology at the University of Utah employed in the University's Pain Management Service, is an expert in end–of–life care and a colleague of Dr. Hare. On April 7, 2000, Assistant Attorney General Elizabeth Bowman contacted Dr. Fine and requested him to review the medical files of the five patients who died under Defendant's care. He was asked to do this for the purpose of becoming an expert witness for the State. He was specifically directed "to focus on issues whether these were end–of–life situations, and whether the condition the patients were in was handled appropriately." Letter from Barlow to Fine of 4/7/00 at 1.

On April 12, 2000, Dr. Fine was designated as an expert witness for the State and subsequently received a letter addressing the proposed fee payment "for preparation and testimony through trial." Letter from Barlow to Fine of 4/20/00. On April 20, 2000, Dr. Fine called Ms. Bowman and indicated that, after his preliminary examination of the medical records of four of the five patients, there was evidence that these patients were terminal and were suffering from pain. Ms. Bowman stated in her notes of this conversation that the issues were no longer clear and straightfor-

ward. On April 26, 2000, Dr. Fine met with Ms. Bowman and Assistant Attorney General Charlene Barlow at his residence in order to further discuss his review of the patients' medical records. According to prosecutors, the balance of the meeting involved Dr. Fine teaching them about hospice care. He also indicated that Defendant was inadequately trained for end–of–life care, was a bad evaluator of disease, and should never practice medicine again. Notwithstanding these opinions, Dr. Fine told prosecutors that he did not believe Defendant's conduct constituted criminal homicide.

Dr. Fine testified that the meeting was a wide–ranging one that lasted several hours. He informed prosecutors that although Defendant was a poor evaluator of medical disease and gave substandard care, it was not atypical. Dr. Fine told prosecutors that based upon his review of the medical records, each patient was terminally ill upon admittance to the hospital and each was suffering from pain. He also indicated that there was evidence of therapeutic intent and that, in his opinion, the uses of medication were not criminal acts that would warrant prosecution, *see* Perry Aff. ¶6, but rather good faith attempts at comfort care. In his view, "the case was one of medical malpractice rather than criminal behavior." Bowman Aff. ¶5. In support of his opinion, Dr. Fine discussed with prosecutors the concept of "double effect" and stated that the records he reviewed indicated that all of the criteria were met to conclude that the principle of double effect was applicable.

At the conclusion of the meeting, given the level of inconsistency between Dr. Fine's views and the State's position relative to the issues in the case, Dr. Fine concluded that the prosecutors no longer had an interest in using him as an expert witness. Indeed, Ms. Barlow expressly told him "that [they] may not be using him as a witness." Barlow Aff. ¶6. In light of this, Dr. Fine asked prosecutors what he should do with his opinion. He was told that defense counsel would be made aware of his opinions. Prosecutors also requested that he not be so forthcoming with his opinions if he were contacted. Dr. Fine understood that he was being asked to avoid all communication in the event an attempt was made by defense counsel to contact him. On the other hand, prosecutors testified that when Dr. Fine asked what he should do with his opinions, they told him that they could not give him any legal advice. Moreover, they told Dr. Fine that defense counsel would be made aware of his name. Although he was asked to stop reviewing the medical records, he was never told that he could not talk about the case. At most, he was told that publicity concerning the case could jeopardize Defendant's right to a fair trial and, therefore,

it would be better if Dr. Fine did not talk about the case publicly.

Following the meeting, Ms. Bowman and Ms. Barlow had a five minute discussion and concluded that Dr. Fine's opinions were not exculpatory. Later, Ms. Barlow discussed the opinions of Dr. Fine with Davis County Attorney Mel Wilson, and then on May 5, 2000, Dr. Fine was removed from the State's expert witness list. On the same day, defense counsel renewed his request "seeking any and all discovery, not heretofore provided, pursuant to Rule 16 of the Utah Rules of Criminal Procedure . . . [and] any other evidence or material . . . which should be made available to the Defendant in order for the Defendant to adequately prepare his defense." Def.'s Renewed Req. for Disc. at pp.1-2.

The evidence presented at the evidentiary hearings conducted in connection with Defendant's motion for a new trial indicates that Dr. Fine has significant expertise in end–of–life care, pain management, and the ethics involved in treating patients at the end of life. He has written guidelines and standards for pain management and hospice care and, as a professor at the University of Utah, spends some of his time instructing doctors about end–of–life care. In addition, Dr. Fine has extensive experience observing and treating patients in conditions similar to the patients who died while under Defendant's care. Because of his expertise and experience, Dr. Fine is familiar with the typical level of care provided to end–of–life patients in Utah and throughout the United States.

According to Dr. Fine, there is no well–defined standard of care for end–of–life patients and, for the most part, the care provided throughout the country is not good. In this case, he opined that the five patients who died while under Defendant's care were admitted to the hospital in a terminal condition. Not unlike most doctors, Defendant was faced with a situation for which he had insufficient training. Although Defendant's care was poor, it was not atypical. The treatment provided satisfied the principle of double effect and, thus, Defendant's conduct fell within the ethical bounds of proper care. Dr. Fine based his initial conclusions on his own experience and study, but then referred to scholarly literature to insure that his conclusions were correct. In addition, he found that each patient was in pain. He opined that while morphine does have a sedating effect, it is usually provided to patients who are suffering from pain. Following his review of the patients' medical records, he concluded that Defendant's use of morphine fell within the acceptable dosage range for these patients. Consistent with this conclusion, he also indicated that while the morphine use may have hastened the death of some of these patients,

they did not die from overdoses of morphine, but rather from other co–morbidities or life threatening diseases.

Dr. Fine is a colleague of Dr. Hare and has worked with him for more than a decade. As a result of this relationship, he knows how Dr. Hare practices and what he teaches his students. Dr. Fine was able to articulate the significant differences of opinion he had and the inconsistencies he noted with the testimony Dr. Hare provided at trial. Among other things, he indicated that in assessing the condition of the patients, Dr. Hare was using a definition of "terminal" applicable only to the field of anesthesiology and not end–of–life care. Furthermore, he stated that Dr. Hare's assessment of whether the patients were stable and whether they were suffering from pain was completely inaccurate, given the patients' behaviors. He also disagreed with Dr. Hare's "piling up" theory to explain the effects of morphine use on a patient and stated that Dr. Hare in practice routinely does exactly what he testified was inappropriate conduct on Defendant's part with respect to the administration of morphine. According to Dr. Fine, Dr. Hare drew inaccurate conclusions concerning the drug doses given by Defendant. Finally, Dr. Fine indicated that on the whole, Dr. Hare's testimony was replete with overgeneralizations and misstatements regarding the patients' medical records.

Legal Analysis

Introduction

Unlike members of the executive or legislative branches of government, whose decisions are routinely and appropriately influenced by public opinion, a trial court judge has an ethical duty to hear and decide matters "[un]swayed by partisan interests, public clamor, or fear of criticism." Utah Code Jud. Conduct Canon 3(B)(2). One of the court's primary judicial obligations in presiding over and ruling on issues in criminal cases is "to secure to [a defendant] his rights and see to it that he has a fair trial." *State v. Stenback*, 2 P.2d 1050, 1063 (Utah 1931). *See also State v. Bishop*, 753 P.2d 439, 473 (Utah 1988) (it is "the trial court's duty to insure that defendant and the State receive[] a fair trial."). Where an allegation has been raised that the prosecution failed to disclose to the defense exculpatory evidence, the trial court's "overriding concern [is] with the justice of the finding of guilt." *United States v. Agurs*, 427 U.S. 97, 112 (1976).

Prosecutors' Duty to Disclose

Due process requirements under both the Fourteenth Amendment to the United States Constitution as well as Article I, Section 7 of the Utah Constitution,

obligate prosecutors in criminal cases to disclose to the defense evidence that has or may have exculpatory or impeachment value, regardless of whether such evidence has been requested. *See Strickler v. Greene*, 527 U.S. 263, 280 (1999) (outlining requirements of the *Brady* rule and its progeny which hold that federal due process requires prosecutors to disclose favorable evidence even if it has not been requested); *State v. Bakalov*, 1999 UT 45, ¶30, 979 P.2d 799 ("It is fundamental that the prosecution has a constitutional duty under both the Utah and United States Constitutions to disclose material, exculpatory evidence to the defense. . . .This is true irrespective of whether the defense requests the favorable evidence.").

In addition, procedural and ethical rules applicable to Utah criminal prosecutions also mandate that "the prosecutor shall disclose to the defense upon request . . . evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment." Utah R. Crim. P. 16(a)(4). *See also* Utah R. Prof. Conduct 3.8(d) ("The prosecutor in a criminal case shall . . . [m]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."). These rules impose upon a prosecutor both a legal and ethical duty to "disclose materials which he [or she] knows or should know contain evidence that is exculpatory or that would otherwise be helpful to the defendant in the preparation of his defense." *State v. Pliego*, 1999 UT 8, ¶12, 974 P.2d 279. *See also State v. Archuleta*, 850 P.2d 1232, 1242-43 (Utah 1993) ("Utah Rule of Criminal Procedure 16(a) imposes a duty on the prosecutor to provide discovery material to the defense on request.").[1]

Commenting on the State's duty to disclose favorable evidence to the defense, the Utah Supreme Court has noted that "[i]t is fundamental that the State, in vigorously enforcing the laws, has a duty not only to secure appropriate convictions, but perhaps an even higher duty to see that justice is done, even if that means

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[1]It should be noted that the duty to disclose applies on a continuing basis. *See* Utah R. Crim. P. 16(b). *See also State v. Carter*, 707 P.2d 656, 662 (Utah 1985) ("To meet basic standards of fairness . . . a defendant's request for information which has been voluntarily complied with . . . must be deemed to be a continuing request."). Moreover, this duty also applies even where the favorable evidence is not within the direct knowledge of the prosecutor, but is known to the prosecutor's staff. *See State v. Pliego*, 1999 UT 8, ¶13, 974 P.2d 279 ("[A]lthough the rule refers to the prosecutor's knowledge, it is not so limited. The knowledge of the prosecutor's staff . . . is imputed to the prosecutor."); *State v. Jarrell*, 608 P.2d 218, 224 (Utah 1980) ("[N]on–disclosure resulting from the failure of . . . other members of the prosecutorial team to inform the defense attorney of exculpatory or other relevant evidence may also result in a violation of due process.").

disclosing to defense counsel in a criminal case evidence which is exculpatory." *Codianna v. Morris*, 594 P.2d 874, 877 (Utah 1979). *See also State v. Williams*, 656 P.2d 874, 877 (Utah 1979) ("[T]he State in a criminal case is duty–bound by law and professional ethics to treat a defendant fairly. A prosecutor may not suppress evidence favorable to defendant to obtain a conviction."). Indeed, a "prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Utah R. Prof. Conduct 3.8 cmt. Consistent with these obligations the Supreme Court has held that

> a criminal proceeding is more than an adversarial contest between two competing sides. It is a search for truth upon which a just judgment may be predicated. Procedural rules are designed to promote that objective, not frustrate it. When a request or an order for discovery is made pursuant to [Rule 16], a prosecutor must comply.

State v. Carter, 707 P.2d 656, 662 (Utah 1985).

Disclosure Standard: Due Process—The *Brady* Rule

A failure to disclose exculpatory evidence to the defense warrants the grant of a new trial only if prejudice to Defendant ensued as a result of the non-disclosure. *See Strickler*, 527 U.S. at 281-82 (true *Brady* violation occurs only if nondisclosure results in prejudice). Prejudice occurs if the State's failure adversely affects Defendant's fundamental rights, such as his right to a fair trial. *See United States v. Bagley*, 473 U.S. 667, 678 (1985) (the government's "suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial."). A defendant's fair trial rights are undermined only where the undisclosed evidence is material, that is, where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. "A 'reasonable probability' of a different result is . . . shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *Bagley*, 473 U.S. at 678). Thus, failure by the prosecution to disclose exculpatory evidence to the defense warrants the grant of a new trial under the due process standard only if the probability of a different outcome, in the absence of the State's failure, is sufficiently high so as to undermine confidence in the outcome of the trial.

In applying the due process standard to the facts related to Defendant's motion for a new trial, several aspects bear emphasis. First, it is not the case that

Defendant must "demonstrate that the evidence if disclosed probably would have resulted in acquittal." *Bagley*, 473 U.S. at 680. Second, whether a sufficient showing that a reasonable probability of a different result exists is not determined by a preponderance of the evidence standard of proof. As noted above, the crucial issue is whether there has been a violation of Defendant's right to a fair trial. Thus, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. Third, sufficiency of the evidence is not the touchstone of whether there is a reasonable probability of a different outcome. *See id.* ("The second aspect of . . . materiality bearing emphasis here is that it is not a sufficiency of evidence test."). The inquiry is not simply one of "determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions." *Strickler*, 527 U.S. at 290. Rather, the issue for the court is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

Fourth, the undisclosed evidence "must be evaluated in the context of the entire record." *Agurs*, 427 U.S. at 112; *accord State v. Martin*, 1999 UT 72, ¶9, 984 P.2d 975. *See also State v. Jarrell*, 608 P.2d 218, 225 (Utah 1980) (undisclosed police reports were considered "in light of the totality of the evidence."). This means that the amount of evidence supporting the verdict, whether great or small, will have an effect on the likelihood that the trial would have resulted in a different outcome had the evidence not been suppressed. For example, if

> one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty–nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not be sure as he had only a brief glimpse, the result might well be different.

Agurs, 427 U.S. at 113 n.21. Thus, the less evidence supporting the jury's verdict, the more likely the trial would have resulted in a different outcome had the exculpatory evidence been disclosed. *See Jarrell*, 608 P.2d at 224 ("[I]f the verdict

is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.").

Fifth, in ascertaining the probability of a different outcome, although the court may "evaluate the tendency and force of the undisclosed evidence item by item," *Kyles*, 514 U.S. at 437 n.10, it is the cumulative effect of the suppressed evidence that determines the likelihood of a different outcome. *See id.* at 436 (the undisclosed evidence must be "considered collectively, not item by item."). Finally, it is Defendant's "burden to establish a reasonable probability of a different result." *Strickler*, 527 U.S. 291.

Disclosure Standard: Rule 16

Consistent with the due process standard, whether a new trial should be granted based upon a failure to disclose exculpatory evidence under Rule 16 "depends entirely upon a determination of whether the prosecutor's failure to produce the requested information resulted in prejudice sufficient to warrant reversal." *Martin*, 1999 UT 72 at ¶13. *See also State v. Hay*, 859 P.2d 1, 7 (Utah 1993) (although prosecution violated its duty of disclosure, reversal was not required because "the prosecution's misconduct was not prejudicial."); *State v. Julian*, 771 P.2d 1061, 1063 (Utah 1989) (defendant not entitled to relief because he "failed to show any prejudice that resulted from the alleged breach of the discovery rules."). Prejudice sufficient to warrant reversal occurs if the State's failure adversely affects the substantial rights of Defendant, such as his right to a fair trial. *See* Utah R. Crim. P. 30(a) ("Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded."). This failure affects the substantial rights of Defendant and "warrants reversal only if a review of the record persuades the court that without the error there was a reasonable likelihood of a more favorable result for the defendant." *State v. Knight*, 734 P.2d 913, 919 (Utah 1987) (citations and internal quotation marks omitted); *accord Martin*, 1999 UT 72 at ¶13.

Like the "reasonable probability" standard enunciated in *Bagley*, the Utah Supreme Court has held that "defining the substantively identical term 'reasonable likelihood' by reference to a reviewing court's confidence in the outcome of trial makes good sense in determining whether reversible error has occurred." *Knight*, 734 P.2d at 920. The Court reasoned that the rules governing criminal trials are intended to insure that the proceedings are a "search for the truth and that the verdict merits confidence. It is entirely consistent with this aim to require that when error has eroded a reviewing court's confidence in the outcome of a particular trial, we should

start over and conduct a new trial." *Id.* Thus, a failure to disclose evidence tending to negate or mitigate the guilt of a defendant after a specific request warrants a new trial only if "'the likelihood of a different outcome [in the absence of the error is] sufficiently high [so as] to undermine confidence in the verdict.'" *Martin*, 1999 UT 72 at ¶13 (brackets in original) (quoting *Knight*, 734 P.2d at 920).

Commenting on this definition, the Court in *Knight* stated that "[t]he erosion–of–confidence criterion gives substance to the more theoretical 'reasonable likelihood' standard," *Knight*, 734 P.2d at 920, and provides some assistance in "determining where on the spectrum of outcome probabilities[2] . . . 'reasonable likelihood' might appear." *Id.* According to the Court, a "reasonable likelihood"

> is certainly above the "mere possibility" point on the spectrum. If it is "more probable than not" that the outcome of trial would have been different, then a court cannot possibly place confidence in the verdict. Furthermore, thoughtful reflection suggests that confidence in the outcome may be undermined at some point *substantially short* of the "more probable than not" portion of the spectrum.

Id. (emphasis added). These comments by the Court are instructive because they imply that even if it is more probable than not that the outcome of a trial would *not* have been different, an error may still sufficiently undermine confidence in the verdict for the court to conclude that there is, nevertheless, a reasonable likelihood of a different outcome and, therefore, that a new trial is required. This language clearly reflects the Court's primary concern in circumstances where the prosecution has failed to disclose exculpatory evidence, namely, whether a defendant received a fair trial. In addition, the Utah Supreme Court has also held that "[t]he more evidence supporting the verdict, the less likely there was harmful error." *State v. Hamilton*, 827 P.2d 232, 240 (Utah 1991). Thus, consistent with the due process standard, the amount of evidence supporting the verdict, whether great or small, will have an effect on the likelihood that the trial would have resulted in a different outcome had the evidence not been suppressed and, therefore, the undisclosed evidence "'must be

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[2]Earlier in the *Knight* opinion, as a prelude to furnishing lower courts with a workable definition of "reasonable likelihood of a different result," the Court stated that

> [i]f we assume a spectrum of probabilities with zero at one end representing no likelihood of a different result and one hundred percent at the other end representing absolute certainty of a different result, we can array verbalizations of probabilities across that spectrum. A "mere possibility" is at the low end of the spectrum, "near certainty" is at the high end, and "more probable than not" is a likelihood greater than fifty percent.

State v. Knight, 734 P.2d 913, 919 (Utah 1987).

evaluated in the context of the entire record.'" *Martin*, 1999 UT 72 at ¶9 (quoting *Agurs*, 427 U.S. at 112).

Finally, although the undisclosed evidence must be evaluated in the context of the entire record, the Utah Supreme Court has indicated that in nondisclosure cases under Rule 16, the record provides little assistance in determining how knowledge of the undisclosed information would have affected defense counsel's preparations for trial or the presentation of the case to the jury. As a result, the nature and magnitude of the prejudice suffered by a defendant is largely uncertain because the court is left to "speculate whether, absent the error, there is a reasonable likelihood that the defense would have adduced other evidence which, when considered in light of the evidence actually presented, would have produced a reasonable doubt as to the defendant's guilt." *Knight*, 734 P.2d at 920. Because of these difficulties, the Supreme Court has held that in cases where violations of Rule 16 involve the nondisclosure by the prosecution of evidence requested by a defendant, it is appropriate

> to place the burden on the State to persuade a court that the error did not unfairly prejudice the defense. Therefore, when the defendant can make a credible argument that the prosecutor's errors have impaired the defense, it is up to the State to persuade the court that there is no reasonable likelihood that absent the error, the outcome of trial would have been more favorable to the defendant.

Id. at 921; *accord Martin*, 1999 UT 72 at ¶14.

Newly Discovered Evidence Standard

When a defendant files a motion for a new trial based upon newly–discovered evidence, he must show "that the evidence satisfies the following factors: (i) it could not, with reasonable diligence, have been discovered and produced at trial; (ii) it is not merely cumulative; and (iii) it must make a different result probable on retrial." *Martin*, 1999 UT 72 at ¶5. In addition, the "newly discovered evidence should clarify a fact that was contested and resolved against the movant." *State v. Goddard*, 871 P.2d 540, 545 (Utah 1994). Reasonable or "[d]ue diligence means ordinary, rather than extraordinary, diligence and it is within the discretion of the trial judge to determine the diligence required under the circumstances." *United States v. Walker*, 546 F. Supp. 805, 811 (D. Hawaii 1982). In order to ascertain whether newly discovered evidence could not have been discovered with reasonable diligence, the court's determination must be based upon the facts, if any, Defendant knew, or reasonably should have known, prior to trial in relation to the discovery of that

evidence. Furthermore, the standard requires that the newly discovered evidence not be *merely* cumulative, which implies that, even if cumulative, so long as the evidence independently clarifies a central issue in the case, the standard may nevertheless be satisfied. *See State v. James*, 819 P.2d 781, 794-95 (Utah 1991) (standard is satisfied where the "evidence was not merely cumulative but was independent evidence which corroborated defendant's statements.").

Finally, although the phrase "make a different result probable on retrial" is linguistically similar to the phrase "reasonable probability (or likelihood) of a different outcome" used in the due process and Rule 16 standards, it is unclear whether the meaning of these phrases is identical. The Utah Supreme Court has indicated that newly discovered evidence makes a different result probable if, with the new evidence, a reasonable jury would have had a reasonable doubt as to whether a defendant's conduct satisfied the elements of the crime with which he was charged. *See*, *e.g.*, *id.* at 795 (new evidence makes a different result probable if "a reasonable jury would have had a reasonable doubt as to whether defendant had the requisite intent to commit murder."). In making this determination, the court may consider the probable weight of the new evidence, *see State v. Loose*, 2000 UT 11, ¶18, 994 P.2d 1237 (trial court has "power to consider the testimony's probable weight as part of its determination as to whether that testimony would 'make a different result probable on retrial.'"), and whether the new evidence is "sufficiently inconsistent with the evidence presented to the jury," *Goddard*, 871 P.2d at 545, to justify concluding that its admission would have made a different result probable on retrial.

Prosecutorial Misconduct Standard

Defendant is entitled to a new trial on the basis of prosecutorial misconduct only if the misconduct is prejudicial to Defendant's rights. *See* Utah R. Crim. P. 30(a). *See also State v. Lafferty*, 749 P.2d 1239, 1255 (Utah 1988) (citing Rule 30(a) and concluding "that the prosecutor's . . . error requires reversal only if it is prejudicial."). Consistent with the application of Rule 30, an instance of prosecutorial misconduct is prejudicial if the misconduct adversely affects the substantial rights of Defendant such as his right to a fair trial. Defendant's fair trial rights are so affected if, in the absence of the misconduct, "there is a reasonable likelihood that . . . there would have been a more favorable result for the defendant." *Hay*, 859 P.2d at 7. As noted above under the Rule 16 standard, the Utah Supreme Court has indicated that a reasonable likelihood of a more favorable result exists when the misconduct erodes the court's confidence in the outcome of the trial. *See Knight*, 734 P.2d at 920

("defining the . . . term 'reasonable likelihood' by reference to a reviewing court's confidence in the outcome of trial makes good sense in determining whether reversible error has occurred."). *See also State v. Dunn*, 850 P.2d 1201, 1224 (Utah 1993) (in context of defendant's claim of prosecutorial misconduct "there would be a reasonable likelihood of an outcome more favorable to [the defendant] . . . [if] we . . . determine . . . [that] our confidence in the verdict is undermined."); *accord Lafferty*, 749 P.2d at 1255. Thus, failure to disclose exculpatory evidence warrants a new trial only if "'the likelihood of a different outcome [in the absence of the error is] sufficiently high [so as] to undermine confidence in the verdict.'" *Martin*, 1999 UT 72 at ¶13 (brackets in original) (quoting *Knight*, 734 P.2d at 920).

Findings of Fact and Conclusions of Law

After reviewing the affidavits and testimony of the witnesses appearing at the evidentiary hearings, considering the arguments made by counsel, and evaluating the cumulative effect of the undisclosed evidence in the context of the entire record and in light of the relevant case law, the court makes the following findings and conclusions with respect to whether the prosecution had a duty to disclose the opinions of Dr. Fine and, if so, whether the nondisclosure prejudiced Defendant.

Duty to Disclose Analysis

In determining whether prosecutors had a duty to disclose, particularly under Rule 16, it is important to note that Defendant made a timely request for all exculpatory evidence known to the prosecution in October 1999 and renewed this request in May 2000. It is clear that Dr. Hare recommended Dr. Fine, one of his colleagues, to the prosecutors and that prosecutors designated Dr. Fine as an expert prior to the April 20th telephone conversation between Dr. Fine and Ms. Bowman. Pursuant to the April 7th letter, Dr. Fine was asked by prosecutors to review selected medical records of the five patients who died while under Defendant's care to determine whether these patients were in end–of–life situations and whether the condition they were in was handled appropriately. Dr. Fine indicated: (1) Defendant did not engage in criminal conduct; (2) all of the patients were terminal upon admission to the Davis Hospital; (3) all of the patients were in pain; and (4) at worst, Defendant's treatment amounted to medical malpractice. As to these four issues, Ms. Barlow stated that Dr. Fine was *adamant* in giving his opinion that what Defendant did was not criminal. With respect to whether all of the patients were terminal and in pain, statements made by the prosecutors, as well as references in Ms. Bowman's notes, suggest qualified acknowledgment of Dr. Fine's opinions. Finally, Ms. Barlow

agreed, both in her affidavit and in her testimony, that Dr. Fine had opined that the conduct of Defendant was, at worst, medical malpractice.

The prosecutors referred, in their supplemental memorandum, to the case of *State v. Jarrell*, 608 P.2d 218 (Utah 1980) where the Utah Supreme Court stated that

> [a] fair–minded prosecutor is not likely to be aware of all potential evidence which a defendant may think relevant, and we do not think it reasonable, given the adversary nature of the criminal process, to require a prosecutor to disclose all evidence which might possibly be useful to the defense but which is not likely to have a foreseeable effect upon the verdict. Such a requirement would create unbearable burdens and also uncertainties with respect to the finality of judgments.

Id. at 225. However, as for evidence which would likely have a foreseeable effect on the outcome of the trial, prosecutors under both State and federal constitutions, the Rules of Criminal Procedure, and the Rules of Professional Conduct, have certain disclosure duties. Specifically, Rule 16(a)(4) of the Utah Rules of Criminal Procedure states that "the prosecutor shall disclose to the defense upon request . . . evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment."

In order to apply Rule 16 and make a determination whether or not the opinions of Dr. Fine tended to negate or mitigate Defendant's guilt, his opinions must be put in the context of the central issues raised during trial. First, one of these issues raised by the State was that the patients were not terminal when they arrived at the Davis Hospital. Second, the State claimed that none of the patients were in pain while under Defendant's care. Finally, the State contended that Defendant intentionally or knowingly terminated the lives of these patients (first degree murder) or, under the lesser included offenses, grossly deviated from the applicable standard of care.

The State makes several arguments that it had no duty to disclose and even if it did, this duty was satisfied. First, the State argues that because Dr. Fine's opinions were inculpatory, they did not have to be disclosed. Although Dr. Fine certainly made significant disparaging comments about Defendant's treatment of the patients, his primary point was that *at worst* Defendant's conduct was medical malpractice. This opinion is contrary to the State's position that Defendant acted criminally in treating these patients. Thus, Dr. Fine's opinions in this regard were actually exculpatory. Second, the State argues that Dr. Fine's statements that Defendant did not engage in criminal conduct would not have been admissible at trial

and, therefore, could not have been exculpatory. In making this argument, the State has taken an overly narrow view of Dr. Fine's statements on defendant's culpability. As defense counsel pointed out during his cross–examination of Ms. Barlow at the evidentiary hearing, any reasonable person would assume that Dr. Fine had reasons for making this statement and that these reasons would have been exculpatory in nature. Indeed, had Dr. Fine concluded that Defendant's conduct was criminal, the State cannot credibly argue that prosecutors would not have inquired further concerning his reasons for that conclusion and then sought to introduce those opinions at trial.

Finally, the State asserts that prosecutors fulfilled their duty to disclose under the *Brady* rule by including Dr. Fine's name on a witness list provided to the defense. In doing this Defendant was put on notice that Dr. Fine was a potential witness and that he may have information concerning the case. If the defense was unaware of Dr. Fine's opinions, it was due to their own tactical decision not to conduct an interview and not the prosecution's duty to disclose. In support of its position, the State cites a Wyoming case in which the Court held that "[t]he prosecution's disclosure of [the witness], by including his name on the stipulated witness list, was sufficient to meet any duty the prosecutor may have had under *Brady*." *Relish*, 860 P.2d at 459. Notwithstanding the Wyoming Supreme Court's holding, the State's argument is both unpersuasive as it applies to the *Brady* rule and irrelevant under a Rule 16 analysis.

The Wyoming Supreme Court's holding upon which the State relies is neither an authoritative pronouncement nor a binding precedent in Utah. Moreover, the Court's ruling is clearly at odds with the spirit, if not the letter, of the *Brady* rule. The principle object of the *Brady* rule is fairness and its fundamental purpose is "to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675. To that end, the State is required "to disclose *evidence* favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Id.* (emphasis added). While this does not require prosecutors "to deliver [their] entire file to defense counsel," *id.*, when they are aware that the opinions of a potential witness tend to negate the guilt of a defendant, fairness requires more from the State than simply placing the witness's name on a witness list without any mention whatsoever of that expert's exculpatory opinions. Furthermore, by its own terms, the holding in *Relish* applies only to the prosecution's due process duty to disclose and, thus, is not relevant to whether the State had an obligation to disclose under Rule 16 of the Utah Rules of Criminal Procedure.

Based upon the foregoing findings and analysis, the court concludes that the opinions provided by Dr. Fine to Ms. Barlow and Ms. Bowman at the April 26th meeting were directly contrary to the central issues comprising the State's theory of the case and, therefore, "tend[ed] to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment." Utah R. Crim. P. 16(a)(4). Moreover, the State's claim that its disclosure obligations under *Brady* were satisfied by simply placing the name of Dr. Fine on a witness list is rejected as being contrary to the intent of the *Brady* rule. In light of the requirements imposed upon the State by due process and the applicable procedural and ethical rules, it is the court's conclusion that prosecutors had a manifest constitutional, legal, and ethical duty to disclose to the defense Dr. Fine's opinions and failed to do so.

Prejudice Analysis

Due Process and Rule 16 Standards

In assessing the significance of the evidence the prosecutors failed to disclose, it is important to note at the outset that the State's case against Defendant was a very close one. Convictions were based, in large measure, upon the opinions of expert witnesses and not on the observations of fact witnesses or incriminating admissions. As a result, the credibility of these witnesses, for or against Defendant, was crucial to securing convictions. Finally, the closeness of the case is perhaps best reflected in the fact that although Defendant was charged with five counts of first degree murder, he was only convicted of two counts of manslaughter and three counts of negligent homicide. This was a case in which Defendant was found guilty, not on the basis of substantial inculpatory evidence, but largely on the basis of which experts were believed and which were not.

Among the experts called by the State, none provided testimony more significant or more crucial than Dr. Hare. But for his opinions on the condition of the patients and the treatment rendered by Defendant, it is questionable whether the State would have obtained any convictions. However, notwithstanding Dr. Hare's expertise, at some point prior to trial it became clear that issues relating to end–of–life care would be important to the case. Dr. Hare, who lacks expertise in treating geriatric and end–of–life patients, recommended one of his colleagues, Dr. Fine, as someone whom the State should consider as an expert witness because of his expertise in the area of end–of–life care.

By all accounts Dr. Fine is a leading expert in the areas of pain management and end–of–life care. He has significant experience treating end–of–life patients with

dementia, which would have been particularly relevant to the present case. Moreover, he has ethical expertise with respect to the treatment of patients at the end of life and is knowledgeable concerning the Utah standard of care applicable to end–of–life situations. His wide–ranging expertise gave him the unique ability to comment on each of the central issues in the case: (1) the condition of the patients; (2) whether they were in pain; and (3) Defendant's care of the patients. Without question, his expert opinions on each of these issues would have undermined the State's case because of the substance of his testimony, his unique qualifications, and his credibility as a witness. Furthermore, his direct testimony on these issues would have created some doubt as to the opinions of Dr. Hare, the State's key witness, and he would have assisted the defense in powerfully cross–examining and impeaching Dr. Hare. Dr. Fine's close association with Dr. Hare provided him with first–hand knowledge of apparent inconsistencies between Dr. Hare's medical practices and his testimony at trial. Certainly, the cross–examination of Dr. Hare by defense counsel would have been radically different had the defense been able to utilize the knowledge and expertise of Dr. Fine. It is difficult to overstate the negative effect on the State's case that his testimony would have had at trial given the authoritativeness and credibility with which Dr. Fine could have testified concerning the issues in dispute,.

The prosecution would have had difficulty countering the testimony of Dr. Fine without putting its own case in jeopardy. On the one hand, had the examination of Dr. Hare not permitted him to defend his opinions against Dr. Fine, then prosecutors would risk Dr. Hare's credibility being undermined. On the other hand, if the examination of Dr. Hare would have allowed him to take exception to the opinions and conclusions of Dr. Fine, prosecutors would risk the possibility of calling the judgment of Dr. Hare into question since he was the one who recommended Dr. Fine. Thus, attempts by prosecutors to undermine the testimony of Dr. Fine would likely have resulted in prosecutors undermining their own case.

In evaluating the impact of the undisclosed opinions of Dr. Fine, the court is aware that it is entirely possible that the jury could have still convicted Defendant even had Dr. Fine's opinions been disclosed. However, in determining whether Defendant is entitled to a new trial based on a claim that prosecutors failed to disclose exculpatory or impeachment evidence, the issue for the court is not whether, "after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions," *Strickler*, 527 U.S. at 290, nor is the issue whether "the evidence if disclosed probably would have

resulted in acquittal." *Bagley*, 473 U.S. at 680. Rather, the court must determine whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been *different*." *Id.* at 678 (emphasis added). A different outcome means anything from an acquittal on all counts to simply a change in one of the them. Moreover, a "reasonable probability" exists that there would have been a different outcome if the cumulative effect of the undisclosed opinions of Dr. Fine, evaluated in the context of the entire record, convinces the court that the "evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

Given these factual conclusions, there is little question that had Dr. Fine testified at trial, he would have provided the jury with powerful and credible point–by–point criticism of Dr. Hare's testimony and would have presented authoritative opinions contrary to the State's case. Therefore, it is reasonable to conclude that the jury would have questioned the reliability of the State's experts, particularly the State's key witness, Dr. Hare, and come to a different result. Confidence in the verdict cannot survive where the undisclosed evidence would have provided the jury with information that could well have led them to reject some, if not all, of the State's theory of the case. This is particularly so given the closeness of the case and the importance of the credibility of the witnesses to the resolution of the issues. Under both the due process and Rule 16 standards, it is the court's conclusion that had the prosecutors disclosed Dr. Fine's opinions to the defense, there is a reasonable probability or likelihood that the outcome[3] of Defendant's trial would have been different.[4]

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[3]During oral argument on the issue of prejudice, the State asserted that assessing whether there is a reasonable probability of a different outcome must be done for each verdict of each count individually and not on the basis of the outcome of the trial as a whole. The State cited no case law in support of this approach. In reading through the State and federal appellate decisions addressing nondisclosure of evidence by the prosecution, it is the court's conclusion that "verdict" is being used synonymously with "outcome" and that this applies to the trial as a whole and not to each individual count. Moreover, in the present case, it would simply be inappropriate to consider the matter in this fashion since the testimony of Dr. Fine, as well as the testimony of all the other witnesses called at trial, apply to every count in the Information.

[4]The court is fully aware that under the due process analysis, the burden is upon the defendant to persuade the court that had the exculpatory evidence been disclosed, there would have been a different outcome to the trial, while under the Rule 16 analysis the burden is upon the State to persuade the court that there is *no* reasonable likelihood that absent the error, the outcome of trial would have been more favorable to the defendant. Obviously, the assignment of burdens based upon

Newly Discovered Evidence Standard

As explained above, before a new trial may be granted on the basis of newly discovered evidence, the evidence must satisfy three criteria: (1) it could not, with reasonable diligence, have been discovered and produced at trial; (2) it is not merely cumulative; and (3) it must make a different result probable on retrial. *See Martin*, 1999 UT 72 at ¶5. Given the circumstances of the case, the court finds that Defendant could not have discovered the opinions of Dr. Fine with the exercise of reasonable diligence. First, since Dr. Fine's name was on the prosecution's potential witness list, it was reasonable for counsel to assume that Dr. Fine's opinions were consistent with the State's case and would not be helpful to preparing a defense. Thus, it was reasonable for counsel to forgo interviewing Dr. Fine. Second, the United States Supreme Court has indicated that "the more specifically the defense requests certain evidence, . . . the more reasonable it is for the defense to assume from the non–disclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption." *Bagley*, 473 U.S. at 682-83. After having made two requests for the disclosure of exculpatory evidence, it was still reasonable for counsel to assume that, when the replacement of Dr. Fine on the witness list came with no explanation, whatever opinions Dr. Fine had in relation to the State's case, these opinions remained the same and, thus, that an interview would be unnecessary. Accordingly, the court concludes that the opinions of Dr. Fine could not have been discovered with reasonable diligence.

The court also finds that the evidence is not merely cumulative. While it is true that had Dr. Fine testified at trial his testimony would have addressed the central issues in dispute and would undoubtedly have replicated the testimony of at least some of the defense experts, the State fails to consider the impeachment value of Dr. Fine's testimony and his uniqueness as an expert witness. The range and depth of Dr. Fine's qualifications are unmatched by any other expert called at trial. Dr. Fine's close association with Dr. Hare provided him with first–hand knowledge of apparent inconsistencies between Dr. Hare's medical practices and his testimony at trial. The cross–examination of Dr. Hare, the State's key witness, would have been significantly different had the defense been able to take advantage of the knowledge and expertise

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the analysis that applies is simply two sides of the same coin. Thus, if the defendant carries his burden under the due process analysis, then the State cannot carry its burden under Rule 16 and vice versa. In the present case, the court's conclusions would be the same regardless of who carried the burden of persuasion.

of Dr. Fine. Given his unparalleled expertise and the authoritativeness with which he would have testified concerning the issues in dispute, coupled with the negative impact his opinions would have had on the credibility of Dr. Hare, the court concludes that the testimony of Dr. Fine was not *merely* cumulative.

Finally, for the very reasons Dr. Fine's testimony would have been more than simply cumulative of the evidence presented at trial had he been allowed to testify, it would also make a different result probable on retrial. As noted above, Dr. Fine would have provided the jury with powerful and credible point–by–point criticism of the State's key witness and presented authoritative opinions contrary to the State's case. Such testimony would have permitted jurors to question the reliability of the State's witnesses and would have allowed them to resolve the central issues in favor of Defendant. Therefore, it is likely that a reasonable jury would have had a reasonable doubt as to Defendant's guilt had jurors been provided with Dr. Fine's expert opinions. Thus, all of the criteria for granting a new trial based upon a claim of newly discovered evidence are satisfied.

Prosecutorial Misconduct Standard

While the definition of prosecutorial misconduct may be somewhat unclear, the Utah Supreme Court has found that the non–disclosure of evidence by the prosecution may constitute misconduct. *See Hay*, 859 P.2d at 7 (misconduct found when prosecutor violated his duty of disclosure by failing to disclose a knife that could have corroborated defendant's story). Nevertheless, "[w]hether the prosecution has committed misconduct depends upon the particular circumstances of each case and bad faith must be shown to establish the existence of misconduct." *People v. Ledesma*, 729 P.2d 839, 885 (Cal. 1987) (quotation marks omitted) (Mosk, J. concurring). Certainly any dishonest or deceptive conduct by prosecutors as part of a deliberate attempt to undermine the truth–seeking function of the judicial process would fall within its parameters. In the present case, however, the information presented at the evidentiary hearings was inconclusive as to whether prosecutors affirmatively discouraged Dr. Fine from divulging his opinions or led him to believe that he should not do so. Therefore, the court cannot conclude that the prosecutors' error in failing to disclose was the result of bad faith nor that the error rises to the level of prosecutorial misconduct. Thus, prosecutorial misconduct cannot serve as a basis for granting Defendant a new trial.

Conclusion

The issue presented to the court is whether Defendant is entitled to a new trial based upon the claim that the prosecution failed to disclose to the defense the expert opinions of Dr. Perry Fine, Professor of Anesthesiology at the University of Utah, relating to Defendant's conduct in treating five patients, all of whom died while under Defendant's care. Under both state and federal constitutions, due process requires that prosecutors "disclose even unrequested information which is or may be exculpatory." *State v. Carter*, 707 P.2d 656, 662 (Utah 1985). Furthermore, procedural and ethical rules applicable to criminal cases mandate that prosecutors disclose to the defense any evidence known to them that tends to negate or mitigate the guilt of Defendant or which tends to mitigate the degree of the offense for reduced punishment. *See* Utah R. Crim. P. 16(a)(4). *See also* Utah R. Prof. Conduct 3.8(d). In this case, counsel for Defendant specifically requested the disclosure of all evidence tending to negate or mitigate Defendant's guilt. Dr. Fine's expert opinions that all of the patients were terminal upon admission to the Davis Hospital, that the five patients were suffering from pain, and that Defendant's conduct was, at worst, medical malpractice, contradicted each of the issues central to the State's theory of the case and were, therefore, exculpatory in nature. The State's failure to disclose the opinions of Dr. Fine, therefore, contravened manifest constitutional, legal, and ethical duties imposed upon prosecutors.

However, a new trial may only be granted "in the interest of justice if there is [an] error or impropriety which had a substantial adverse effect upon the rights of the [defendant]." Utah R. Crim. P. 24(a). The State's error in failing to disclose exculpatory evidence, therefore, only warrants a new trial if this error substantially affected one of Defendant's rights, such as his right to a fair trial. Such an adverse effect occurs if the likelihood of a different verdict, in the absence of the State's failure, is sufficiently high so as to undermine confidence in the outcome of the trial.

Given the qualifications of Dr. Fine and his credibility as an expert witness, as well as the testimony he would have provided had his opinions been disclosed to the defense and the impact this testimony would have had on the State's key witness in the case, it is clear that the likelihood of a different result is sufficiently high so as to undermine confidence in the outcome of the trial. It necessarily follows that the error committed by the State, either as a due process or Rule 16 violation or in the context of newly discovered evidence, had a substantial adverse effect upon the fair trial rights of Defendant. Pursuant to Rule 24, he is, therefore, entitled to a new trial. This

ruling has the effect of nullifying the judgment rendered in the case and places Defendant "in the same position as if no trial had been held." Utah R. Crim. P. 24(d).

The court notes that its ruling only addresses the fairness of the trial proceedings and should not be taken as a comment on the jurors' conclusions with respect to the evidence that was presented to them or their service generally. Confidence in the outcome of the trial was undermined solely by the prosecution's error in failing to disclose the exculpatory opinions of Dr. Fine and in no way resulted from the jurors' conduct or deliberations. Their dedicated and attentive service throughout the duration of a lengthy and complex criminal trial is deserving of the highest respect and appreciation by this court.

IT IS ORDERED that Defendant's Motion for New Trial is granted.

DATED this 9th day of January, 2001.

BY THE COURT:

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Judge Thomas L. Kay
Second Judicial District Court

Certificate of Delivery

The undersigned certify that a true and correct copy of the foregoing Memorandum Decision and Order was hand–delivered on January 9, 2000 to:

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